

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling that)	WC Docket No. 02-361
AT&T's Phone-to-Phone IP Telephony)	
Services are Exempt from Access Charges)	

COMMENTS OF THE VON COALITION

Bruce D. Jacobs
Glenn S. Richards
Susan M. Hafeli
Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037-1128
Telephone: (202) 663-8000

December 18, 2002

Summary

The developing use of voice applications over the Internet and other IP networks is having a gradual but profound and beneficial impact on the United States and the world. While the industry is still in the early stages of development, it is already reducing the cost of international communications, fostering innovation, increasing competition, and promoting the deployment of broadband.

Since its inception, the Commission has consistently declined to regulate IP telephony. This policy includes a presumptive exemption from interstate access charges. On the international stage, the Commission has consistently and repeatedly voiced its support for the non-regulation of Internet services, including Internet voice. The VON Coalition urges the Commission to maintain that policy.

Incumbent local exchange carriers should not be permitted to engage in the kind of self-help to which AT&T complains it has been subjected, particularly when the ILECs' action so clearly contravene established Commission policy. To the extent the Commission undertakes to review the merits of any dispute between AT&T and specific ILECs, those proceedings should be limited to the specific circumstances presented.

Table of Contents

Background	2
Voice on the Internet.....	2
United States policy regarding IP telephony	5
The AT&T Petition.....	8
Discussion.....	10
I. The Commission should continue to apply deregulatory policies to voice over the Internet to the maximum extent possible	10
II. ILEC self-help measures taken against Internet voice providers contravene federal policy	11
III. To the extent the Commission undertakes to review the merits of any dispute between AT&T and specific ILECs, those proceedings should be limited to the specific circumstances presented	12
Conclusion	13

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling that)	WC Docket No. 02-361
AT&T's Phone-to-Phone IP Telephony)	
Services are Exempt from Access Charges)	

COMMENTS OF THE VON COALITION

The Voice on the Net Coalition (the "VON Coalition")¹ hereby submits these comments in response to the Public Notice released November 18, 2002 by the Wireline Competition Bureau in the above-captioned proceeding.² The VON Coalition generally supports AT&T's request that the Commission maintain a moratorium on access charges for voice over Internet and take only the most limited action possible to address AT&T's concerns. A policy of restraint is consistent with current Commission policy, which has been reluctant to extend legacy regulations to Internet services for several reasons, including the need for reform of certain legacy regulations; the national policy of encouraging development of the Internet and Internet

¹ The VON Coalition membership is developing and offering voice products and services for use on the Internet and other Internet Protocol ("IP") networks. The VON Coalition was formed in 1996 to respond to the petition filed by America's Carriers Telecommunication Association ("ACTA"), which requested injunctive relief and a declaratory ruling that providers of IP software and hardware are telecommunications carriers subject to regulation and the access charge regime. The VON Coalition opposed the ACTA petition and subsequently participated in various Commission proceedings, including the 1998 *Universal Service Report to Congress*, its *Notice of Inquiry* regarding Section 255 disability access, and the recent universal service proceeding involving review of carrier contribution mechanisms. Additionally, the VON Coalition has worked with the United States government in connection with the International Telecommunication Union, including the World Telecommunication Policy Forum on IP Telephony. Additional information regarding the VON Coalition is available on its website, <http://www.von.org>.

² Public Notice, *Wireline Competition Bureau Seeks Comment on AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, DA 02-3184 (November 18, 2002).

services; the nascent level of development of many of those services; and the difficulty of categorizing such services.

Background

Voice on the Internet. The development of VON products and services is tied closely to the deployment of the Internet generally. Voice is essentially just another application being deployed on these networks, often in combination with other applications. These additional capabilities are possible, in part, because the Internet offers openness, thereby encouraging innovation. *See, e.g., Isenberg, David, The Dawn of the Stupid Network, ACM Networker 2.1 (February/March 1998) at 24-31.*³ (In contrast, the Public Switched Telephone Network operates as a closed system on which it is impossible for innovative developers to build new applications. The failure of Advanced Intelligent Networking illustrates the problem of closed systems impeding the development of innovative products and services.) As such, it permits entrepreneurial firms to develop new hardware and software applications that can seamlessly fit into the network. As computer processing power increases even more, VON products and services are poised to make communications even more innovative, affordable, and universal.

The Internet and other IP networks also offer an inherent efficiency, reliability, and functionality for communications, particularly those that combine different kinds of data, including voice. The conventional circuit-switched PSTN works on the model that each customer's equipment must be connected by a continuous line to a telephone company switch, whether or not the line is actually in use. At the long-distance level, a continuous link must be established and maintained between each pair of users for the duration of a call, regardless of the actual information sent through that path. By contrast, the Internet trades increased use of

³ This article is also available at <http://www.isen.com/papers/Dawnstupid.html>.

computer processing for a decreased use of transmission facilities and automatically re-routes packets around problems such as malfunctioning routers or damaged lines, without relying on a separate signaling network. As the cost of computer processing continues to decrease and the demand for communications bandwidth by consumers increases, IP systems increasingly offer a more economical and robust means for providing communication connections than the conventional circuit-switched PSTN.

Propelled in part by the U.S. Government's "hand's off" regulatory approach, the development of the Internet and voice on the Internet is having a gradual but profound and beneficial impact on the United States and the world. Use of VON is drastically reducing the cost of international communications and creating a foundation for broadband communications that have much greater capacity and functionality than is offered by the PSTN. In the U.S., hundreds of thousands of low-income immigrants have used VON to dramatically lower the cost of communicating with friends and relatives outside the United States, through either personal computer-based VON or VON used by prepaid calling card companies. This phone-to-gateway network configuration has the added advantage of permitting those without a computer and broadband service to obtain the benefits of the Internet. Perhaps the most dramatic impact has been on certain foreign markets, where VON has been a leading force for lowering costs to consumers, increasing competition, and increasing deployment of broadband. VON Coalition members have persuasively invoked the U.S. regulatory model in lobbying overseas governments, such that in many instances, even in telecom monopoly markets, the first steps toward deregulation have included implementing Internet Telephony services. In fact, Internet Telephony provides an unusually effective procompetitive message: it enables overseas carriers to use existing infrastructure while saving costs and introducing a new technology to be used

with future applications. For example, one VON Coalition member enabled a local carrier in Bolivia to take advantage of the recent deregulation and, with no capital expenditure, become a domestic and international long distance carrier on November 28, 2001, the day Bolivia deregulated its telephony markets. That carrier now has over 40% market share in several regions of the country and averages 10-15% market share country-wide. Consumer rates in Bolivia have been reduced 40% in a year. This competition and resulting rate reduction, and such phenomena in a lengthy list of countries, would not have happened without the use of voice over the Internet, as emerging entities do not have the money to build out a circuit-switched network. Similarly, rates to and from India have come down almost 50% since that country's April 2002 deregulation. Much of the voice traffic now coming and going from India to the rest of the world is traveling over the Internet. India was able to accomplish this because of the rapid deployment, low capital expenditures and flexibility afforded by voice over the Internet.

Another area in which VON is making significant strides is with regard to enterprise deployment. Corporations and other large institutions are deciding to add voice capability to their Internet connections and data networks in order to save money and increase efficiency. For instance, we understand that the U.S. Department of Commerce recently added voice capability to its data network. Deployment in the enterprise environment ranges from point solutions, which involve the installation of key applications to address pressing problems, to network upgrades and more global solutions intended to establish a unified network capable of carrying data and voice traffic.

Personal computers increasingly offer VON capability. For instance, Microsoft's most recent operating systems include an application that enables VON. The increased deployment of consumer broadband, with its always-on connectivity, should be a boon to the deployment of

VON. A new group of entrepreneurs has begun offering innovative new voice applications to residential and small business consumers who have broadband connections, including unlimited local and long-distance calling and on-line call logs. With Free World Dialup (“FWD”) 3.0, for example, users of different broadband technologies (cable, DSL, Ethernet, satellite, etc.) can place calls over the Internet to other FWD members without ever accessing the PSTN.

Despite this growth and the prospects for it to continue, the deployment of VON has not had significant impact on the revenue of traditional domestic circuit-switched telephone companies. The use of VON by immigrants, in the enterprise setting, and by broadband consumers is not coming at the expense of incumbent local exchange carrier (“ILEC”) access charge revenue.

United States policy regarding IP telephony. As AT&T explains, since the inception of voice over the Internet, the Commission has consistently declined to regulate. This policy, which includes a presumptive exemption from access charges, was articulated in the Commission’s *Universal Service Report to Congress. Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 90 (1998) (“*Report to Congress*”) (also referred to as the “Stevens Report”). The analysis of IP telephony in the *Report to Congress* addressed many of the issues raised in a 1996 petition for rulemaking asking that IP telephony software and hardware providers be classified as common carriers. *Id.* at ¶ 83, n. 172; see *America’s Carriers Telecommunications Association, Provision of Interstate and International Interexchange Telecommunications Service via the “Internet” by Non-Tariffed, Uncertified Entities, Petition for Declaratory Ruling, Special Relief, and Institution of a Rulemaking*, RM-8775 (filed March 4, 1996).

In its *Report to Congress*, the Commission discussed the difficulty of categorizing IP telephony and the extent to which many of its deployments had characteristics of unregulated, information services. The Commission expressly deferred any definitive pronouncement regarding even those offerings that had characteristics of regulated, telecommunications services, however, until it had more facts. *Id.* at ¶ 90 (“[W]e recognize the need, when dealing with emerging services and technologies in environments as dynamic as today’s Internet and telecommunications markets, to have as complete information and input as possible.”).

Universal service considerations provided further support for the Commission’s decision to defer action. The Commission recognized that when an exempt provider purchases connectivity to its users via business lines, that provider supports universal service by generating telecommunications revenue in the form of tariffed rates and line charges. *Id.* at ¶ 97. Moreover, the Commission found that since the Telecommunications Act of 1996 (the “1996 Act”) made a decisive break from the practice of implicit universal service subsidy structures, permitting enhanced service providers to purchase connectivity via end-user tariffs rather than access tariffs “comports with the plain language of the 1996 Act and the public interest.” *Id.* at ¶ 147.⁴

As AT&T points out, the Commission has declined subsequent opportunities to act with respect to IP telephony. Petition at 16-17. Significantly, the Commission did not issue a Public

⁴ The VON Coalition supported a connection-based mechanism in the Commission’s recent universal service rulemaking. *Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket Nos. 96-45 and 98-171, FCC 02-329 (rel. Dec. 13, 2002).

Notice or otherwise seek comment on the *Petition of US West, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony* (filed April 5, 1999). Petition at 16-17.

On the international stage, the Commission has consistently and repeatedly voiced its support for the non-regulation of advanced technologies, including IP telephony. Chairman Powell, for example, urged attendees at the International Telecommunications Union's Second Global Symposium for Regulators to give "broadband and digital technologies" a minimally regulated environment "that is nurturing and will allow them to blossom and develop into the great platform that we envision." *Remarks of FCC Chairman Michael K. Powell*, ITU 2nd Global Symposium for Regulators, Geneva, Switzerland (December 4, 2001). He explained that the United States was committed to minimal regulation of these advanced technologies because "we are fearful of intervening prematurely in a way that frustrates experimentation and creativity on that platform." *Id.* Referring specifically to VON telephony, Chairman Powell said, "In the United States we have yet to choose to regulate IP telephony and are confident of that decision. We do not assume it is simply a new form of an old friend." *Id.*; *see also Remarks of Commissioner Susan Ness*, ITU World Policy Forum Information Session on IP Telephony, Geneva, Switzerland (March 6, 2001) ("The FCC encourages governments to remain open to the development of IP telephony. We understand that these are complex issues and that there are no simple solutions. The United States believes that, to the greatest extent possible, market forces should continue to drive technological advances and innovation in IP telephony.").

This past June, Commissioner Martin echoed Chairman Powell's remarks:

At the FCC, we are fearful of intervening prematurely in a way that frustrates experimentation and creativity.

We are especially concerned about this in the context of IP telephony. As you know, in the United States, we have not chosen to regulate IP telephony, but are continuing to monitor marketplace

developments. We refuse to just assume that it is a new form of an old friend. . . . Indeed, VoIP presents an incredible opportunity for consumers worldwide and we have found our approach has encouraged its development. At the same time, VoIP challenges settled definitions and preconceptions about what is voice and data, who provides which technology, and which regulatory boxes they should occupy.

Welcoming Remarks by Commissioner Kevin J. Martin to the African VoIP Conference, Supercomm 2002, Atlanta, Georgia (June 5, 2002). The challenge and opportunity for regulators, then, is to find “the best way to not regulate.” *IP Telephony and U.S. Policy, Regional Workshop on Internet and IP Telephony (Powerpoint presentation by Julie A. Barrie, ITU-T Specialist, FCC International Bureau) (Jan. 7-10, 2002).*

The AT&T Petition. On October 18, 2002, AT&T filed a petition with the FCC requesting a declaratory ruling that its “phone-to-phone” Internet services are exempt from access charges and may lawfully be provided over end-user local services. Petition at 1. The services at issue appear to be limited to AT&T voice services that are routed to the Internet on a 1+ basis using circuit-switched Feature Group D access lines and terminating on either ILEC or CLEC local business lines. When technically feasible, AT&T passes Calling Party Number (“CPN”) on this traffic. *Id.* at 18-19.

AT&T filed its petition in response to the actions of ILECs that, according to AT&T, are refusing properly to provision local business lines for its service, taking down local business lines that are being used to terminate such calls, and assessing interstate (and intrastate) access charges on calls that terminate over reciprocal compensation trunks. *Id.* at 4-5.

In response to these ILEC self-help measures, AT&T requests declaratory relief and a moratorium that would prohibit any access charge assessment on offerings of voice over the Internet. AT&T points out the *de minimis* deployment of such services, estimating them to be

between 1% and 5% of all interexchange calling. *Id.* at 27. According to AT&T, the requested ruling will quell a controversy between AT&T and the ILECs and provide leadership and guidance to state commissions grappling with these issues on an intrastate level.

AT&T explains that its IP-based services are provided over the Internet and that “few things would be potentially more destructive of the development of the Internet than would a rule that prohibited Internet services from using local services to reach end users and that required that they pay the access charges that have been found to have rate structures that are ‘above-cost’ and ‘inefficient.’” Petition at 25 (footnote omitted). In addition, AT&T explains that the incumbent LECs’ access charge assessments “are quite clearly contrary” to the policy that the Commission has followed over the past five years of exempting phone-to-phone Internet telephony services from access charges. *Id.* AT&T identifies multiple reasons underlying this policy: (i) to prematurely subject innovative new Internet services to the regulations and costs applicable to circuit-switched services risks stifling innovation and competition; (ii) even if some Internet telephony services currently have characteristics of telecommunications services, they are evolving services that offer the potential for the provision of integrated voice, data and enhanced services; and (iii) premature determinations regarding the applicability of access charges risks discrimination between providers that may distort competition. Finally, AT&T points out that its requested relief will not harm either incumbents or universal service. As AT&T explains, it already compensates ILECs for their costs, either through payments for ILEC flat-rate local private lines or business lines purchased under end-user tariffs or through reciprocal compensation payments from competitive LECs to the ILECs. AT&T adds that it supports Universal Service both by the end-user telecommunications revenues it generates and

the direct contributions it makes when it provides telecommunications services over its Internet facilities.

Discussion

I. The Commission should continue to apply deregulatory policies to voice over the Internet to the maximum extent possible

The VON Coalition supports the Commission's "wait and see" policy regarding voice over the Internet and access charges. Petition at 6. As AT&T's Petition makes clear, the factors that led the Commission to adopt its practice of restraint and non-intervention regarding VON are unchanged.

VON remains a nascent industry. Premature intervention, as AT&T notes, risks stifling the innovation and competition that are hallmarks of nascent industries, and is at odds with the statutory mandate of Section 230(b) to preserve the "vibrant and competitive free market" for the Internet.

Consistent with its hands-off policy towards Internet services, the Commission has decided not to place these services into an access charge regime designed to recover costs associated with circuit-switched traffic when end-user charges adequately compensate the ILEC for the costs incurred in carrying Internet traffic. *See* Petition at 32 (citing *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 346 (1997)). Although access charges are being reduced and the implicit subsidies therein are being gradually eliminated, the premature application of access charges to Internet voice traffic would violate fundamental principles of cost causation that have guided the Commission as it reforms the access charge system. *See, e.g., In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, Sixth Report and Order, 15 FCC Rcd 12962, ¶ 12 ("CALLS Order"), *aff'd*

in part, rev'd in part, and remanded in part, Texas Office of Public Util. Counsel, et al. v. FCC, 265 F3d 313 (5th Cir. 2001).

Continuation of the Commission's hands-off policy is also warranted by the complexities associated with defining individual voice offerings and drawing distinctions between the regulatory classifications of "telecommunications services" and "information services." As the Commission explained in its *Report to Congress*, "[w]e recognize that new Internet-based services are emerging, and that our application of statutory terms must take into account such technological developments. . . . We do not believe . . . that it is appropriate to make any definitive pronouncements [regarding IP telephony] in the absence of a more complete record focused on individual service offerings." *Report to Congress* at ¶ 83.

II. ILEC self-help measures taken against Internet voice providers contravene federal policy

Incumbents that assess access charges on Internet voice services and take the types of measures described in the AT&T Petition both violate the Commission's policies and engage in impermissible self-help. If a LEC believes it is appropriate to assess access charges with respect to a particular VON service, then the burden should be on the LEC to obtain relief. Consistent with the Commission's *Report to Congress*, local exchange carriers should be prohibited from assessing access charges on Internet voice providers unless and until a service is classified as a telecommunications service and it is determined that the service provider obtains the same circuit-switched access that traditional interexchange carriers ("IXCs") obtain, and therefore imposes the same burdens on the local exchange as do the IXCs. *See Report to Congress* at ¶ 91.

III. To the extent the Commission undertakes to review the merits of any dispute between AT&T and specific ILECs, those proceedings should be limited to the specific circumstances presented

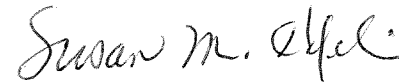
The *Report to Congress* wisely took the position that, to the extent the Commission were to address classification of VON, it would do so only with respect to specific services for which it had a specific factual record. *Report to Congress* at ¶¶ 90-91. The VON Coalition urges the Commission to maintain this element of its policy to the extent that it feels compelled to address the classification of AT&T's service. The larger the scope of any proceeding, the greater the need for a larger and larger factual record, one that undoubtedly will need continuous updating as the proceeding progresses. Further, unnecessarily broad action carries significant international ramifications as other countries look to the United States for regulatory guidance. Under these circumstances, and given the state of deployment of Internet voice, the more prudent course remains the more limited one.

Conclusion

Therefore, based on the foregoing, the VON Coalition recommends that the Commission maintain, to the greatest extent possible, its hands-off policy towards Internet voice services. Rather than grant the expansive relief that AT&T requests in its Petition for Declaratory Ruling, the Commission should take more limited action to resolve the problems AT&T has encountered.

Respectfully submitted,

THE VON COALITION



Bruce D. Jacobs
Glenn S. Richards
Susan M. Hafeli
Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037-1128
Telephone: (202) 663-8000

Dated: December 18, 2002